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NO. 84-1509 and NO. 84-1493

In the

# Supreme Court of the United States

OCTOBER TERM, 1984

SEATTLE-FIRST NATIONAL BANK,
*Petitioner* in Case No. 84-1509
and
NATIONAL LABOR RELATIONS BOARD,
*Petitioner* in Case No. 84-1493
*vs.*
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, et al.,
*Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

## BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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# BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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This brief *amicus curiae* is filed with the written consent of the parties. The letters giving consent have been separately filed with the Court.

## INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is a federation consisting of several thousand state and local chambers of commerce and trade and professional associations as well as more than 180,000 corporations, partnerships and proprietorships who maintain direct membership. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member employers in important labor relations matters before the courts, the United States Congress, the Executive Branch, and the independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance its members' interests in a wide spectrum of labor relations litigation.

The Chamber has filed *amicus* briefs in the case before the Ninth Circuit on both occasions in which this case was before that Court. The Chamber also filed briefs in the similar case in the Fifth Circuit—*Amoco Production Co.* v. *NLRB,* on both occasions in which the Fifth Circuit had that case under consideration (see its decisions in 613 F.2d 107 [5th Cir. 1980] and in *Local No. 4-14, Oil Workers Int'l. Union* v. *NLRB,* 721 F.2d 150 [1983]). The Chamber's primary concern in both cases related to the NLRB's failure to look realistically at these so-called change-in-affiliation cases and its readiness to permit the substitution of large international unions for independent unions without giving employees the kind of governmentally monitored free choice which the National Labor Relations Act is intended to protect.

In the Chamber's view, the Board, by unwarranted legal fictions, has tended to avoid holding elections in such cases by finding that each such large labor organization is, as a matter of law, the same labor organization as the independent, without adequate scrutiny of the record facts.*

In this case the Board, while not requiring an NLRB election, has at least required that all employees in the unit be afforded an opportunity to vote in a union-conducted election before the Board will issue an amended certification in the name of the international union.

At least that much concern is welcomed by the Chamber, and we do not believe a Court of Appeals should be allowed to undo that much reform by the Board in this area.

It is the Chamber's position that a Court of Appeals cannot properly second guess the N.L.R.B. when the Board has exercised its administrative discretion to deny a petition for an amended certification. More particularly, the Chamber's view is that the Board is well within the scope of its administrative discretion when it requires unit-wide employee participation in a union-conducted private election on a change in affiliation as a precondition to amending an existing certification.

The Chamber urges that review courts should not be allowed to interfere with the Board's commendable administrative efforts to promote a broader employee franchise in affiliation changes.

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* While we believe the Board demonstrated exactly that tendency in this case, that is not the issue currently before this Court, as we understand it.

## SUMMARY OF FACTS AND PROCEEDINGS

In the present posture of this case, the relevant facts are uncontroverted, and were reasonably accurately summarized in the Opinion of the Ninth Circuit. *Financial Institution Employees of America, Local No. 1182* v. *NLRB*, 752 F.2d 356 (9th Cir. 1984) at 357-359. We will review them briefly here.

In 1970, the Firstbank Independent Employees Association (the Independent) had been certified by the National Labor Relations Board as the exclusive bargaining representative of a unit of employees of Petitioner Seattle-First National Bank (the Bank). By 1978, there were 4,800 employees in that bargaining unit. In February of 1978, the Independent conducted a vote among its members, and a majority of those voting (1,206 out of 1,980) voted to affiliate with the Retail Clerks International Union, which has since merged into the United Food and Commercial Workers Union.

Acting upon a petition for amendment to the Independent's certification, the National Labor Relations Board, in April of 1979, granted the petition and, by the amendment, certified "Financial Institution Employees of America, Local No. 882, chartered by Retail Clerks International Union, AFL-CIO" (the Affiliated Local).

The Bank refused to recognize or bargain with the Affiliated Local, and in an ensuing unfair labor practice proceeding, the NLRB found the Bank guilty of an unlawful refusal to bargain, violative of Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordered the Bank to bargain with the Affiliated Local. The Board's findings and conclusions rested squarely

on the amended certification, and not on any evidentiary determination that the Affiliated Local actually enjoyed majority status among the employees in the bargaining unit.

The Bank had challenged the validity of the amended certification on two primary grounds: (1) that all employees in the unit, not just union members, should have been permitted to vote on the affiliation; and (2) that the Affiliated Local was a substantially changed and different union from the Independent, and therefore could be entitled to bargaining rights and a certification only if it had demonstrated majority status in a Board-conducted election. The Board rejected both contentions, sustained the validity of the affiliation, and ordered the Bank to recognize and bargain with the Affiliated Local.

The Bank petitioned for review of the Board's order in the Ninth Circuit, and the Board cross-petitioned for enforcement. Before the Court reached the case for decision, the Board requested the Court to remand the case to the Board for reconsideration because it was analytically dependent upon *Amoco Production Co. (Amoco III)*, 239 N.L.R.B. 1195 (1979), remanded *Amoco Production Co.* v. *N.L.R.B.*, 613 F.2d 107, 111-112 (5th Cir. 1980), a somewhat similar case which had been remanded to the Board by the Fifth Circuit. The Fifth Circuit had remanded for a factual analysis of the Board's conclusion that the Affiliated Union there was the same union as the previously unaffiliated union, or, as it is sometimes phrased, whether there was sufficient continuity between the pre- and post-affiliation union.

On remand, however, the Board did not undertake such an analysis, either in *Amoco* or in this case. Instead,

the Board, in both cases, announced a revision of its "due process" prerequisite for issuing amended certifications, ruling that as a part of such "due process" a petitioner seeking an amended certification would be required to show that all bargaining unit employees, not just union members, had been given an opportunity to vote on the affiliation. Since that prerequisite was not met, either in *Amoco* or here, the Board in each case, on remand, revoked the amended certification and dismissed the unfair labor practice complaint of refusal to bargain.

It should perhaps be noted here that the NLRB had required, from 1977 to 1979, that such an all-unit opportunity to vote had been provided, as a prerequisite to issuing an amended certification. That requirement had been announced in *Jasper Seating Co.*, 231 NLRB 1025, 1026 (1977). In its decision in *Amoco III*, 239 NLRB 1195 (1979), however, the Board had overruled *Jasper Seating*, and thus in both the *Amoco* case and the Board's original decision here, it had not required the all-unit opportunity to vote. Upon the remands in *Amoco Production Co. (Amoco IV)*, 262 N.L.R.B. 1240 (1982) and here, the Board thus once again reverted to its 1977-1979 requirement of the all-unit voting opportunity.

The Affiliated Local petitioned for review of the Board's decision on remand in this case. The Ninth Circuit found the Board's requirement of an all-unit voting opportunity to be irrational and inconsistent with federal labor policy. It thus once more remanded to give the Board the opportunity to make a factual determination of whether the Affiliated Local was the same union as the Independent, or whether it was substantially changed. The Court rejected the plea of the Bank, the

Affiliated Local, and the United States Chamber of Commerce, as *amicus,* that the Court itself review the factual merits and make a determination of this issue. *Financial Institution Employees of America, Local No. 1182* v. *NLRB,* 752 F.2d 356, at 359, n. 4.

Both the NLRB and the Bank then petitioned this Court for *certiorari,* each pointing out that the Fifth Circuit in *Amoco IV, Local No. 4-14, Oil Workers Intl Union* v. *NLRB,* 721 F.2d 150 (1983) had reached a contrary result, upholding the Board's reversion to its Jasper Seating requirement of an all-unit opportunity to vote as a prerequisite for granting amended certifications. A conflict in the Circuits is thus presented, and this Court has now granted *certiorari.*

## SUMMARY OF ARGUMENT

It is the Chamber's position, on the issue now before this Court, that the Court of Appeals for the Ninth Circuit overreached its reviewing authority, and has improperly attempted to restrain a proper exercise of administrative discretion by the National Labor Relations Board.

When a union requests an amended certification because of a change in affiliation, the Board applies two tests—one statutory, the other administrative, and hence discretionary, in nature.

The statutory issue is whether the change in affiliation has resulted in a substantially changed union. If so, the Board has no statutory authority to amend the certification. There is such an issue in this proceeding, but it is not before this Court because it was not decided by the Board although the Court's initial remand contemplated that it would be.

The administrative, discretionary issue is whether the change in affiliation has taken place by what the Board deems reasonably democratic procedures. The Board here, upon remand, determined that the union had too narrowly construed the scope of the democratic franchise, in that only union members, instead of all employees in the unit, had been given an opportunity to vote. Hence the Board revoked the amended certification which it had earlier granted.

The Board then dismissed, upon remand, the unfair labor practice complaint, because it had rested squarely upon the validity of the amended certification. Hence the only issue before the Ninth Circuit after the Court remand was whether the Board had properly exercised its discretionary authority with respect to monitoring its certifications.

The Board, we urge, must be permitted wide latitude to establish and revise the standards to be met by a union seeking to have the Board amend an already issued certification. In such administrative matters, the Board's authority is either totally unreviewable under 5 U.S.C. §701, or review is restricted, under 5 U.S.C. §706, to situations in which the Board's action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

The Board's policy of establishing certain democratic standards for an affiliation vote as a prerequisite to granting an amended certification to a newly affiliated union is well within its administrative discretion. The current policy of including among such prerequisites an opportunity for an all-unit vote is appropriately and rationally grounded upon the Board's perceived need

to broaden the base of those democratic standards. While views may differ as to the need for thus broadening the base, the Board's decision to have done so is not arbitrary, capricious, an abuse of discretion, nor in any way not in accordance with the terms of the statute it is charged with administering. The redefinition of the democratic standards test which has occurred over the years with respect to the breadth of the franchise in affiliation votes represents a typical kind of revision in judgment which an administrative agency is entitled to make as its membership and its views change from time to time.

The Court of Appeals for the Ninth Circuit improperly seeks to narrow the discretion committed to agency discretion by law. The Court appears to have confused the discretion the Board has in such an administrative area with statutory limitations on its authority to regulate union conduct under its unfair labor practice jurisdiction. The Court erroneously appears to have treated this matter as if the Board had prohibited a union from adopting and enforcing rules governing its members' conduct. Instead, this case involves only the Board's conditioning the grant of a discretionary privilege — the issuance of an amended certification — on the union's meeting certain democratic standards in its affiliation voting.

In addition, the Court's premises will not withstand scrutiny. The Court's expressed concern for stability in collective bargaining and for the continued viability of the Board's contract bar rules in election cases are concerns which are simply not presented by the facts or the legal issues in this case. The Board has not altered its contract bar rules. Nor did the Board's decision here dis-

turb the term or the continued effectiveness of the collective bargaining agreement. Instead, the Board's decision here simply determined the appropriate designation of the union which is one of the contracting parties to the underlying collective agreement. The Board's denial of the amended certification merely left the Independent, rather than the Affiliated Local, as the appropriate party to continue to administer that contract on behalf of the unit employees.

Thus no legitimate concern for the Board's contract bar rules nor for bargaining stability can justify the Court's attempted interference with a proper exercise of administrative authority by the Board. The Ninth Circuit has improperly attempted to substitute its own judgment for the Board's in an administrative area entrusted to agency discretion. In so doing it has exceeded its proper reviewing authority.

## ARGUMENT

### I. The Board's Action in Denying a Requested Amendment to a Certification Should be Found to be Discretionary and Unreliable.

#### A. Although the Statute Restricts the Board's Authority to Issue Certifications, It Nowhere Mandates the Issuance of Amended Certifications.

The National Labor Relations Act, as amended, deals in only one section with the issue of when the Board is required to issue a certification to a labor organization of that union's status as the exclusive bargaining agent for employees. The only such reference is in that part of the Act establishing the Board's authority to hold a Board-conducted secret ballot election to determine whether a union represents a majority of the employees in an appropriate bargaining unit. In Section 9(c)(1), 29 U.S.C. §159(c)(1), the Act states:

> If the Board finds upon the record of such a [representation case] hearing that such a question of representation exists, it shall direct an election by secret ballot and *shall certify the results thereof.* (Emphasis supplied.)

Thus, under the Act, a labor organization has a *right* to a certification if and only if it has won an election conducted by the Board under Section 9 of the Act.[1] In no

[1] There is value for a union in earning such a certification. There is an exemption from union unfair labor practices under Section 8(b)(4)(B, 29 U.S.C. §158(b)(4)(B) for a labor organization which "has been certified as the representative of such employees under the provisions of

other circumstances is the Board *required* by law to issue a certification.

Nowhere does the Act refer to amendments of existing certifications. Since the only authority the Board has to issue a certification is to a union which has demonstrated its majority status in a Board-conducted election, it is obvious that an amended certification may only be issued to the *same* union which had previously demonstrated its majority status in a Board-conducted election.

Thus, in cases in which the Board has issued an amended certification to a union substantially *different* from the originally certified union, Courts of Appeal have held that the Board improperly issued the amended certifica-

(footnote 1 continued)
Section 9 . . .[1]." A union has protection under Section 8(b)(4)(C), 29 U.S.C. §158(b)(4)(C) from picketing by a rival union if the union seeking such protection "has been certified as the representative of such employees under the provisions of Section 9." A union also has an exemption from the prohibitions against jurisdictional dispute picketing under Section 8(b)(4)(D), 29 U.S.C. §158(b)(4)(D) if "the employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees perfoming such work." And a union also enjoys an exemption from the Act's prohibitions of recognition picketing under Section 8(b)(7), 29 U.S.C. §158(b)(7) if "such labor organization is currently certified as the representative of such employees."

On the other hand, a union which has not been issued a certification is not disabled from serving as a representative of employees or from entering into contracts on their behalf or from enforcing the terms of such contracts if the union in fact has majority status. Certification thus offers certain protections and advantages to a union, but is not an essential prerequisite to its successful functioning.

tion. *Retail Store Employees, Local 428* v. *NLRB,* 528 F.2d 1225,1228 (9th Cir. 1975); *Sun Oil Co. of Pennsylvania* v. *NLRB,* 576 F.2d 553 (3rd Cir. 1978); *NLRB* v. *Bernard Gloekler North East Co.,* 540 F.2d 197 (3rd Cir. 1976); *American Bridge Div. United States Steel Corp.* v. *NLRB,* 457 F.2d 660,663 (3rd Cir. 1972).

While the Board itself normally makes the initial determination as to whether the affiliated union is the same union, and has denied amendments on this ground, *Gulf Oil Corp.,* 135 N.L.R.B. 184 (1962), the courts in such cases as those cited above have been diligent in requiring that a Board finding of continuity be supported by substantial evidence, as is, of course, the courts' right and duty when reviewing Board findings in support of any order to remedy an alleged statutory violation.

While the Board's authority to *grant* requested amendments is, therefore, restricted as a matter of law, no provision of the Act *requires* the Board *ever* to amend one of its certifications. Hence in all affiliation cases, the Board could refuse to issue amended certifications, thus requiring any newly affiliated, disaffiliated, merged, or spun-off organization to participate in and win a Board-conducted election in order to earn a certification in its newly designated status.

Since there is no statutory requirement that the Board issue amended certifications at all, it follows that the Board has a very wide area of discretion as to when it will grant a request for such an amendment. No court decision of which we are aware, save for the Ninth Circuit's decision here, has ever attempted to exercise its review authority in such manner as to fault the Board for a refusal to grant a request for an amended certification.

### B. The Board's Decision Not to Issue an Amended Certification Should Be Totally Immune from Judicial Review.

In this case, therefore, the Board's action in declining to issue an amended certification, which it has the *discretion* to issue but is under no statutory obligation to issue, is an action which should be committed solely to agency discretion, and not subject to review at all. 5 U.S.C. §701 precludes any judicial review when "agency action is committed to discretion by law." §701(a)(2).

In parallel cases under other laws, courts have held administrative decisions on similar discretionary grants to be totally unreviewable. In *Sierra Club* v. *Hickel,* 467 F.2d 1048 (6th Cir. 1972), *cert. den.,* 411 U.S. 920 (1973), for example, when the Secretary of the Interior had discretion to, but was not statutorily required to, enter into land exchange agreements, his refusal to enter into such an agreement was held not judicially reviewable. Similarly, in *Knight Newspapers, Inc.* v. *United States,* 395 F.2d 353 (6th Cir. 1978), when a statute gave the Postmaster General authority to make postage refunds, but did not require him to do so, his action in denying a refund was held not reviewable. And in *Ferry* v. *Udall,* 336 F.2d 706 (9th Cir. 1964), *cert. den.,* 381 U.S. 904 (1965), when the statute gave the Secretary of the Interior the authority to issue "cash certificates" evidencing his sale of certain public lands, but did not require him to sell such lands or issue such certificates, his refusal to issue such a certificate was held nonreviewable.

Not only is the issuance of amended certifications a discretionary administrative grant under the N.L.R.A., but

indeed the Board's exercise of its Section 9 authority, in *toto,* is not subject to judicial review.[2] It may be incidentally reviewable, when the Board restrains an unfair labor practice because Section 9(d) requires that a relevant representation case record be included in the record of the unfair labor practice proceeding when the Board's unfair labor practice order is before the Circuit Court for enforcement or review. *American Federation of Labor* v. *National Labor Relations Bd.,* 308 U.S. 401 (1940) at 410,411. But here the Board has decided *not* to restrain any unfair labor practice because the erroneously issued certification had been revoked, and thus there was no basis for the once but no longer viable Section 8(a)(5) proceeding.

When the Board is not obligated to, and has not issued a certification, and has thus dismissed the unfair labor practice proceeding sought to be predicated thereon, the courts have held that the Board's dismissal of the unfair labor practice proceeding is not reviewable. *General Drivers, Etc.* v. *National Labor Relations Board,* 179 F.2d 492 (10th Cir. 1950). That case dealt with a situation in which the Board had declined to issue a certification in the first instance. But the reasoning applies equally to a situation in which an amended certification has been revoked. In

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[2] Representation case decisions by the National Mediation Board, the Board's counterpart in the railway and airline industries, have also been held not to be judicially reviewable. *Switchmen's Union of North America, et al.* v. *National Mediation Board, et al.,* 320 U.S. 297 (1943).

The courts have also affirmed the N.L.R.B.'s authority to "police its own certifications,"as the Ninth Circuit has itself recognized. *NLRB* v. *Detective Intelligence Service,* 448 F.2d 1022, 1025 (9th Cir. 1971). See also *National Labor Relations Bd.* v. *Clarostat Mfg. Co.,* 216 F.2d 525 (1st Cir. 1954).

neither instance is there an outstanding, viable certification on which to predicate an unfair labor practice, and the unfair labor proceeding thus must fall as a matter of course.

We therefore respectfully submit that the Board's exercise of its administrative discretion here by refusing to issue the amended certification because the Union failed to meet the Board's prerequisites, is not subject to any judicial review at all. Once the certification was revoked, there was no basis for the refusal to bargain charge, and the complaint had to be dismissed.

## II. The Board's Refusal to Amend the Certification Here Was, In Any Event, a Reasonable Exercise of Its Discretion.

### A. The Limited Reviewability Standard of 5 U.S.C. §706.

While we have urged that the Board's exercise of its discretion in refusing to grant a requested amendment to a certification be held to be non-reviewable under 5 U.S.C. §701, we recognize that it may be argued that it is subject to a very limited review under 5 U.S.C. §706. 5 U.S.C. §706 provides that a reviewing court shall:

> . . . hold unlawful and set aside agency action, findings, and conclusions found to be:
>
> a) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law;

As the Ninth Circuit itself noted at some length in *Ness Investment Corporation* v. *United States Department of Agriculture, Forest Service,* 512 F.2d 706 (9th Cir. 1975), some tension exists between the total nonreviewability concept of Section 701 and the arbitrary and capricious standard of Section 706. But, as the Ninth Circuit held in *Ness,* very little, if any, opportunity for re-

view is available when an administrator has the discretion to, but is not required to, issue a certificate or permit.

### B. The Board's Standards For Issuing Amended Certifications in Cases of Changed Affiliations.

The National Labor Relations Board has, over the years, chosen to issue amended certifications under certain limited circumstances. As already pointed out, it can do so under the statute only if the requesting union is the same union as the one previously certified under a different name. This has become known, and was referred to by the Ninth Circuit, as the Board's test of "continuity of representation" in the course of which, in a case involving a change in affiliation, the Board determines whether the nature and character of the union was in any significant respect substantially changed as a result of the change in affiliation.

In addition to seeking to comply with that statutory limitation on its right to issue certifications, the Board has also exercised its discretion in affiliation change cases by utilizing its administrative discretion to establish certain prerequisites which must be met as a condition of granting the privilege of the amended certification. The standards which it has adopted relate, essentially, to whether the affiliation change was accomplished by democratic means.[3] Thus the Board has required that there be ade-

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[3] Although sometimes termed a "due process" inquiry, it does not relate to the protection of property rights against a governmental taking, in the traditional due process sense. Instead the inquiry relates to whether democratic procedures have been followed, and might more appropriately be referred to as the Board's "democracy" test.

quate and proper notice of the affiliation vote,[4] and an orderly voting procedure, including reasonable precautions to maintain a degree of secrecy of the ballot.[5] We know of no case in which any court of appeals has ever held that the Board could not properly exercise its administrative discretion by establishing and enforcing these democratic prerequisites to granting an amended certification in cases of new or changed affiliation. Nor does the Ninth Circuit so suggest here.

In formulating and applying these democratic standards, the Board has vacillated on the issue of the breadth of the democratic franchise. Prior to 1977, the Board deemed its democracy requirement met even though only union members were allowed to vote on the affiliation issue. As pointed out, *supra,* p. 6, a majority of the Board Members decided otherwise in the *Jasper Seating* case in 1977, and for the next two years the democracy test included a broader franchise—one extending to all employees in the bargaining unit. This was done on the theory that since the union has a duty to represent all employees in the unit, all such employees should have a voice in determining whether their bargaining agent should affiliate with an international union or change or rescind such an affiliation.

By 1979, the composition of the Board had changed, and in *Amoco III,* by a 3-2 decision, a majority of the

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[4] *Peco, Inc.,* 204 NLRB 1036 (1973).

[5] See the discussion by both the majority and a dissenting members of the Board in *Bear Archery Div. of Victor Comptometer Corp.,* 223 NLRB 1169 at 1171-1172, and 1173-1174, enforcement denied, *NLRB* v. *Bear Archery Div. of Victor Comptometer Corp.,* 587 F.2d 812 6th Cir. (1977).

then Board members once again narrowed the required franchise to union members. In 1982, the Board membership had again changed, and in *Amoco IV,* the broader franchise requirement of *Jasper* was reinstated, again by a 3-2 decision of the Board.

The instant case has been buffeted by the winds of these changing views. The requested amended certification was originally sought here at a time when the broader franchise was required, but by the time it reached the Board for decision in 1979, the requested amended certification was granted, following the *Amoco III* precedent. Now, upon remand from the Court of Appeals, the amended certification was revoked in 1982, with the Board now following the *Amoco IV* precedent.

The difference in views among Board members on this issue appears to stem from whether they view a change in affiliation as having an "indirect" effect on unit employees who are not union members, as the dissenting Board members in *Amoco IV* argued,[6] or whether, as the majority asserted, "affiliation votes affect the interests of all employees," and an affiliation decision ". . . directly impacts on matters within the breadth of the Act . . ."[7] The members also differ on whether the requirement improperly impinges on internal union affairs, as the dissenting members argued,[8] or whether, as the majority stated, it is no more of an impingement on union internal affairs than the Board's other tests of democracy such

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[6] *Amoco IV,* 262 NLRB at 1242.

[7] *Id.* at 1241.

[8] *Id.* at 1242.

as its notice requirements and its orderly and properly protected voting requirements.[9]

As *amicus*, our sense of fairness leads us to the view that the current Board majority has the better of those arguments. We are offended by the injustice which would result here from permitting 1,206 employees to determine the affiliation issue for 4,800 employees. But whether one's own views tend to support the position of the current majority or the views of the dissenting Board members who were part of an earlier majority, we respectfully suggest that neither set of views can properly be described as "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law" within the meaning of 5 U.S.C. §706.

Yet only if the current majority's views, and its decision herein, are that far beyond the scope of the discretion vested in the Board to monitor its own certifications can there be even an arguable basis for judicial review.

### C. Change in An Agency's Views Does Not Increase Vulnerability to Judicial Review.

The changing views of the Board on the scope of the democratic franchise in affiliation votes may be a source of irritation for lawyers who try to advise clients as to the Board's requirements. But such changes are typical of the way the administrative process operates from time to time. Since the Board has discretion in this area, it may choose to exercise that discretion differently at different times without interference by reviewing courts. As this Court said in *NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335, 351 (1978):

> An administrative agency is not disqualified from changing its mind.

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[9] *Id.* at 1241.

Changes in membership of administrative boards and commissions do result in some changes in viewpoint. Such changes neither invite nor authorize judicial reversal of their administrative determinations. In *Butte, Anaconda & Pacific Ry. Co.* v. *United States,* 290 U.S. 127 (1933), this Court held that the Interstate Commerce Commission had unreviewable discretion to determine whether or not a "deficit" was sustained. The Commission's definition of "deficit" had changed as its membership changed. This Court said at page 135:

> Obviously, "mistake there was none, but merely a revision of judgment in respect of matters of opinion." *United States* v. *Great Northern Ry. Co.,* 287 U.S. 144, 151.

In *Butte* this Court wisely refrained from itself determining which of the Commission's changing definitions was proper. Instead, this Court said:

> We have no occasion to determine which of the Commission's interpretations of the word "deficit" is the correct one. *Id.* at 135.

We respectfully submit that the Ninth Circuit here should similarly have refrained from determining which of the Board's varying views as to the appropriate breadth of the democratic franchise was the better view. Instead it should have limited itself to finding that the current majority's broader concept of the scope of the democratic franchise provides a rational basis for its action here.

The Board, we submit, here acted within its authority. It exercised its discretion in a reasonable manner in a debatable subject area. The law requires no more, even if the Board's action is subject to 5 U.S.C. §706, rather

than being, as we believe it is, within the wholly unreviewable province of 5 U.S.C. §701.

## III. The Ninth Circuit Has Misconstrued and Misapplied Its Reviewing Authority.

### A. This Is Not a Case In Which The Board is Regulating Union Conduct Through Its Unfair Labor Practice Jurisdiction.

Throughout its decision, the Ninth Circuit appears to have misconstrued the Board's action here as if the Board had been regulating union conduct by deciding that the union was guilty of an unfair labor practice and, thus, of violating the Act. Had that been what the Board was doing, the Court's ruling might arguably have been within the permissible scope of its reviewing authority in unfair labor practice proceedings.

As this Court well knows, the Board's decisions in unfair labor practice cases are, by the Act itself, made reviewable. 29 U.S.C. §160(f). In such cases the courts of appeal must determine both whether the Board's factual findings are supported by substantial evidence on the record considered as a whole and whether the Board's interpretation in application of the unfair labor practice prohibit prohibitions of the Act are consistent with the language of the statute and with Congressional intent in enacting the law. Even in such cases, however, the courts customarily grant deference to the Board's expertise. But there does not exist the same kind of essentially unreviewable discretion as is applicable to the Board's exercise of its Section 9 administrative functions.

The Court's confusion in this regard is perhaps made most clear by its discussion of whether the Board has, in

the Court's view, intruded too far into internal union affairs. In that discussion, the Court relies heavily on this Court's holdings in such cases as *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967); *NLRB* v. *Boeing Co.*, 412 U.S. 67 (1973); and *Scofield* v. *NLRB*, 394 U.S. 423 (1969). But in all of those cases the issue presented for review was whether the respondent union had been guilty of an unfair labor practice. More precisely, the issue in each of those cases was whether the unions had violated their obligations to their members and thus had contravened the proscriptions of Section 8(b) of the Act, 29 U.S.C. §158(b), or whether the union's actions were, instead, a reasonable exercise of their powers of governance.

But here the Board has not found that there was any violation of the prohibitions of Section 8(b). No contention is made that the Independent's policy permitting only its members to vote on affiliation issues exceeded its powers of self-governance, nor that it constituted union coercion of employees in contravention of Section 8(b)(1), 29 U.S.C. §158(b)(1). The Board's holding, neither in *Amoco IV* nor in this case, prohibits any union from following whatever voting procedure it wishes on affiliation issues, without fear of prosecution under the unfair labor practice provisions of the Act.

The Court's discussion of those unfair labor practice cases adds nothing to the analysis of whether the Board's refusal of a discretionary benefit—an amended certification—may properly be conditioned upon this union's meeting certain Board-prescribed democratic standards. And indeed the Court itself seems to recognize the Board's authority to set such standards, when it speaks with apparent approval of what it calls "assuring that

democratic voting procedures are observed in affiliation elections," (752 F.2d at 367) by other of the Board-specified requirements designed to that end. Yet we assume that neither the Ninth Circuit nor any other Court of Appeals would enforce those democratic procedures which the Ninth Circuit praises by finding a failure to observe them a violation of Section 8(b)(4). Indeed, it is doubtful that the statute gives the Board any authority to so hold, in light of this Court's decisions in *Allis-Chalmers, Boeing,* and *Scofield.*

The Board is not, however, similarly limited with respect to requiring democratic safeguards, including a wider breadth of the democratic franchise, as a prerequisite to the discretionary grant of an amended certification. The Ninth Circuit appears to have failed to recognize the distinction, and by failing to do so has misconstrued its reviewing authority.

**B. The Court is Wrong When It Says The Board Has jeopardized viability of Collective Agreements.**

The Court is also wide of the mark in its attempted evaluation of the effect of the Board's amended certification rules on bargaining stability. It errs, first because striking of an appropriate balance between the need for industrial relations stability and the need for maintaining full freedom of choice for employees is precisely the kind of policy decision which is entrusted to the expert agency administering the Act. It is not an area in which the courts are entitled to second guess the Board.

As the Court of Appeals for the D. C. Circuit said in *Leedom* v. *International Broth. of Elec. Workers, Local Union No. 108, AFL-CIO,* 278 F.2d 237,242 (D.C. Cir. 1960):

> Congress relied on the Board's expertise to harmonize the competing goals of industrial stability and employee freedom of choice to best achieve the ultimate purposes of the Act.

Secondly, the Court appears to have misunderstood the effect of the Board's decision here. The decision not to amend a certification does not destroy the contract or the bargaining relationship, nor, as the Court seems to suggest, does it have the effect of decertifying a certified union. When the Board declines to amend, the old certification remains in full force and effect, and the original union has both the protection of its certification and its full rights as a party to the collective agreement. No union has been decertified, as the Ninth Circuit seems to suggest, nor is any term of the governing collective agreement altered one whit by the Board's declination to amend the certification.

The only effect of the Board's decision is as to the designation of the party entitled to administer the agreement on behalf of the employee constituency. If, as here, the Independent fails to follow adequately democratic procedures in effectuating its attempted affiliation, then it must continue to administer the agreement as an independent, unaffiliated union. Had it followed the Board-prescribed democratic requirements, then it could administer the contract as an affiliated local.[10]

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[10] We find nothing in the Board's decision in this matter which discusses the continued viability of the contract. Nor do we find any indication in the Board of the Court's opinion that the Bank was shown, by this record, to have repudiated its contract here. The Ninth Circuit notes that in *Amoco* the employer "unilaterally cancelled" the current contract. We find no discussion in any of the decisions issued by the Board or by the Fifth Circuit in the *Amoco* cases as to whether that repudiation *per se* was a viola-

In summary, then, the Court of Appeals for the Ninth Circuit seems to have misconstrued its reviewing authority by approaching this case as if this were a proceeding against a union in which the Board had found the union guilty of unfair labor practices. Instead, this case is an unfair labor practice proceeding against the employer, charging only a refusal to bargain, and predicated solely upon the Affiliated Local's possession of an amended certification issued to it by the Board. When the Board, in its discretion, subsequently decided it had improvidently issued that amended certification and revoked it, the refusal to bargain case fell. That case stood or fell solely upon the amended certification and thus upon an exercise of the Board's discretionary administrative powers, an area as to which a Court of Appeals has little, and probably no, reviewing authority.

Furthermore, in attempting to apply what it misunderstood as its reviewing authority, the Court compounded its error by confusing this case with one in which a union had been shorn of its bargaining rights and/or of its contract rights. But the mere denial of a requested amend-

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(footnote 10 continued)
tion of the Act. Such repudiation may, at least arguably, be lawful if an affiliation results in a substantially different union. In such a situation, if the original contracting union no longer exists, and a substantially changed union is the only labor organization claiming to represent the employees, it may be that the contract has become a nullity because of the defunctness of one of the contracting parties. Under those circumstances the employer would not be bound by a contract and could "repudiate" it. That issue is not presented here because the Board did not decide the continuity issue on remand, because there is no claim here of a contract repudiation by the Bank, and because there has been no finding here that the Independent is defunct.

ment to a certification does not destroy the Independent's rights in those areas, unless, of course, the affiliation worked a substantial change in the union — a matter which has not here been determined. Since it must therefore be assumed for present purposes that the Affiliated Local is essentially the same union as the Independent, the only issue is whether the Independent or the Affiliated Local is to be the one designated in the Board's certification and the one to administer the contract. That simply does not present the kind of issues with which the Court seemed to believe it was dealing.

These considerations, too, require a finding here that the Court exceeded its reviewing authority, perhaps because its premises were faulty. But whatever the reasons, as we believe we have demonstrated throughout this brief, the Court did not have authority to interfere with the Board's reasonable exercise of its administrative discretion in declining to grant an amended certification. Once it had exercised its discretion in this manner, there was no basis for the unfair labor practice proceeding, and its order of dismissal of that proceeding should be sustained.

## CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed, and the Board's revocation of its amended certification and its ensuing dismissal of the unfair labor practice proceedings should be allowed to stand.

Respectfully submitted,

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